Supreme Court, U.S.
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No. 98-1382

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

PULITZER PUBLISHING COMPANY,
Petitioner,

v.

THOMAS M. GODFREY, ELLIOT BLAYLOCK, JAY BLUESTONE, DONALD R. BRISCOE, BARRETT BURSTEIN, FLORISSANT NEWS, INC., RAMON DEVINE, TIMOTHY C. DEVINE, DONALD GRIESEMER, RONALD KAEMMERER, FERGUSON NEWS CO., INC., FELIX KUCENAS, THOMAS J. MURPHY, ANN S. POINTER, CYRIL SALVO, NORMAN SEGALL, ROBERT STROUD, JACK R. VOGT, AND HAROLD WEGGEMAN,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Background Facts

Petitioner's statement of the facts is one-sided and incomplete. Branch dealers sell newspapers at retail in vending machines. Anyone who passes a vending machine on the way to or from work, while shopping, or otherwise traveling throughout the Greater St. Louis Metropolitan Area is a potential customer for the branch dealer whose territory he or she passes through or works in, regardless of where the potential customer resides. There are roughly 2,000 St. Louis Post-Dispatch vending machines in the area through which the branch dealers sell their newspapers. Thus, all of the 2,500,000 residents of the Greater St. Louis Metropolitan Area are potential customers of each branch dealer. Records maintained by Petitioner concerning customers who have lost money in malfunctioning vending machines demonstrate that a significant number of newspapers are purchased by customers who reside outside of the branch in which they purchase their St. Louis Post-Dispatch newspapers.

Proceedings Below

Petitioner utilizes its Statement of the Case to argue the merits of its position when it represents to this Court that the Eighth Circuit "overlooked the fact there is *no* basis in federal case law for its own conclusion." (Petition 4.) (emphasis added). It is Respondents' understanding that the Petitioner's Statement of the Case is supposed to be a neutral and unbiased recitation of the proceedings below, and is not the appropriate section of the Petition for argument.

REASONS FOR DENYING THE WRIT

It is Petitioner's position that, in order to establish subject-matter jurisdiction for a civil claim for violations of § 2(a) of the Robinson-Patman Act, a plaintiff must prove that: (1) defendant has sold a product to different purchasers at different prices; (2) at least one of the sales being compared took place in interstate commerce; and (3) the favored purchasers compete with the plaintiff. Petitioner's position is supported by *Mayer Paving & Asphalt Co. v. General Dynamics Corp.*, 486 F.2d 763 (7th Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974); it was rejected by the court below.

Petitioner states that "[t]he Eighth Circuit in this case has destroyed the unanimity previously existing on this issue . . . ." (Petition 8.) This is a gross misrepresentation.

Petitioner lists 26 cases in which this Court has interpreted the Robinson-Patman Act. (Petition 5 n.2.) These cases occupy 592 pages of the official reporter. These pages may be scanned in vain for any support for Petitioner's "unanim[ous]" proposition of law.[1] There is not even a hint in any of the majority, plurality, concurring, or dissenting opinions in these cases that proof of competition between favored and disfavored purchasers is a prerequisite for exercise of subject-matter jurisdiction in cases alleging price discrimination in violation of § 2(a) of the Robinson-Patman Act. It seems beyond belief that, if Petitioner's position was universally accepted, as Petitioner claims, it would not have received at least a passing mention by some member of this Court at some time in the past eighty-five years.[2]

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[1] In fact, there is a *dictum* in one of the cases cited by petitioner, *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 546 (1960), which supports the Eighth Circuit's decision. See p. 8 *infra*. *Also cf. Corn Prod. Refining Co. v. FTC*, 324 U.S. 726, 745 (1960).

[2] The Robinson-Patman Act is a revision of § 2 of the Clayton Act, but the pertinent language regarding jurisdiction was not altered.

Nor is this purportedly "unanim[ous]" jurisdictional prerequisite found in the words used by Congress, which made it unlawful "for any person engaged in commerce, in the course of such commerce . . . to discriminate in price between different purchasers . . . where either or any of the purchasers involved in such discrimination are in commerce . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce . . . ." 15 U.S.C § 13(a). This Court has interpreted this to mean that Congress intended to limit its exercise of its power under the commerce clause to situations where at least one of the sales to a favored purchaser, or one of the sales to a disfavored purchaser, crossed a state line. *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186 (1974). The statute does not say "competing purchasers" or "competitors." *Shoenberg Farms, Inc. v. Denver Milk Producers, Inc.*, 231 F. Supp. 266, 267 (D. Colo. 1964); *see Rutledge v. Electric Hose & Rubber Co.*, 511 F.2d 668, 677 (9th Cir. 1975); *Century Hardware Corp. v. Acme United Corp.*, 467 F. Supp. 350, 354 (E.D. Wis. 1979); *see also Bowen v. New York News, Inc.*, 366 F. Supp. 651, 681 (S.D.N.Y. 1973), *rev'd on other grounds*, 522 F.2d 1242 (2d Cir. 1975), *cert. denied*, 425 U.S. 936 (1976).

In contrast to the single commentator cited by Petitioner for "the unanimity existing on this issue," there are at least three commentators who have listed the "jurisdictional requirements" for § 2(a) price discrimination treble damage claims, none of whom have included "sales to competitors" in their lists. Earl W. Kintner & Joseph P. Bauer, *Federal Antitrust Law* § 21.2 at 145 (1983); Daniel J. Baum, *The Robinson Patman Act* 6-14 (1964); Hugh C. Hansen, *Robinson-Patman Law: A Review*, 51 FORDHAM L. REV. 1113, 1125-33 (1983).

None of the three district court opinions relied on by Petitioner to create the "unanimity previously existing on this issue" supports Petitioner's position. *Ashkanazy v. I. Rokeach & Sons,*

Inc., 757 F. Supp. 1527 (N.D. Ill. 1991), is a primary line case, with plaintiff and defendant being competitors. In such a case, it makes no difference whatsoever whether any favored or disfavored purchasers compete. *F.T.C. v. Anheuser-Busch, Inc.*, 363 U.S. 536, 545-46 (1960); *see Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954).

In Petitioner's second district court case, *Beam v. Monsanto Co.*, 414 F. Supp. 570 (W.D. Ark. 1976), the *Beam* plaintiffs purchased oil for the manufacture of asphalt cement from Monsanto and used the resulting asphalt to repair and resurface highways in Arkansas. Monsanto sold the same oil to Madden Contracting Company of Louisiana "for use in Louisiana on entirely different projects in which the plaintiffs had no interest[,]" at a lower price. *Id.* at 581, 584. There were no retail customers involved. The case is factually not comparable to the instant case.

Petitioner's final district court support for its "unanimity" statement is *Callahan v. A.E.V., Inc.*, 1994 WL 682756 (W.D. Pa. 1994). In that case, the court held that: "A prerequisite to establishing secondary line injury is that the *favored and disfavored customers must be competing in the same geographic and product markets*, . . . and therefore only the sales to competing buyers are relevant for jurisdictional purposes." *Id.* at 3 (emphasis added). It is incontestable that the Greater St. Louis Metropolitan Area is a single geographic market for the sale of daily newspapers at retail, and that all of the favored and disfavored branchmen sell their newspapers within that market.

Petitioner's five judicial authorities, and professors Areeda and Hovenkamp, cite *Mayer Paving* for the proposition that sales to competitors are a jurisdictional requirement for § 2(a) treble damage cases, but do so slavishly without engaging in any analysis of the correctness of such a proposition. In *Mayer Paving*, a customer of a quarry operator complained of sales to

it and other Illinois purchasers of such materials. The jury returned a plaintiff's verdict for $498,204, but the district court entered judgment n.o.v. for defendant on the grounds that plaintiff did not compete with the Indiana contractors, and there were thus no interstate sales to compare. *Id.* at 766, 772. Justice Clark dissented. *Id.* at 772-75.

The court reasoned: (1) there was insufficient evidence to find that plaintiff was in competition with the Illinois contractors, and, therefore, (2) plaintiff could not have been damaged by the discriminatory sales to the Indiana contractors, and, therefore, (3) the purchases by plaintiff could not have "injure[d] competition," and (4) the Indiana purchases in commerce were not "purchases involved" under the language of § 2(a), and, therefore, (5) the jurisdictional requisite of an interstate sale was not met.

The first question is why the court reached the jurisdictional issue to begin with. If plaintiff was not in competition with the Indiana purchasers, it could not have proved damages. This is as far as the court needed to have gone to set aside the verdict for plaintiff. But, even if the court had gone further and found that plaintiff had not proved an effect on competition, that, again, should have been the end of the matter. The majority's reason for going all the way around the horn to reach out and decide the case on jurisdictional grounds is a mystery.

The majority admitted that there was no case law which supported its resolution of the case on jurisdictional grounds, and sought its sole support in Frederick M. Rowe, *Price Discrimination Under the Robinson-Patman Act* (1962). In fact, that treatise is quite contrary to the majority's rationale.

The Seventh Circuit first relied on Rowe for the undisputed proposition that "'the applicability of Robinson-Patman is determined by this rule of thumb: at least one of the two transactions which, when compared, generate a discrimination must cross a

state line.'" *Mayer Paving*, 486 F.2d at 766. This statement is found in § 4.9 at 78-79. This subsection, titled "Interstate Commerce," is found in Chapter 4, Jurisdictional Requirements of the Robinson-Patman Act, Section "E. The 'Commerce' Requirement." Rowe makes no mention of "sales to competing purchasers" on either page 78 or page 79.

The *Mayer Paving* majority's second reference to Rowe is "See also Rowe, Price discrimination, supra," in support of the proposition that the "distinction" between "primary line injury" cases and "secondary line injury" cases "is well-established" and "has substantial impact on the disposition of the present case." *Mayer Paving*, 486 F.2d at 768. If the "*supra*" is a reference to the entire treatise, it is meaningless as support for the result reached by the *Mayer Paving* majority.

The third reference to Rowe found in *Mayer Paving* is as follows: "The analytical distinction involving the 'competing customer' is discussed in Rowe, Price Discrimination, *supra* at 80." *Mayer Paving*, 486 F.2d at 770. The only reference to "the 'competing customer'" at page 80 of Rowe's treatise is: "In a case concerning a seller's discriminations allegedly detrimental to competition at the customer level, the Act applies whether the seller located in State A quotes a lower price to a customer within State A than he asks of a competing customer in State B; or, conversely, whether the seller in State A charges the customer in his home state a higher price than the out-of-state purchaser." Rowe, *supra* at 80.

In support of the above sentence, Rowe says "Cf. Also Sun Cosmetic Shoppe, Inc. v. Elizabeth Arden Sales Corp., 178 F.2d 150, 152-53 (2d Cir. 1949)." Rowe, *supra* at 80. n.148. *Sun Cosmetic* involved a claim under § 2(e) of the statute, not 2(a). The question therein, which the court answered in the affirmative, was "whether it was an actionable wrong to deny the plaintiff, whose business is altogether intrastate, a favor which

the defendant granted to 'agencies' in other states ...." *Sun Cosmetic*, 178 F.2d at 152.

Rowe's use of the phrase "competing customer" was incidental to the example given of when there would be a sale in interstate commerce for jurisdictional purposes, as indicated by the fact that the case cited related to the issue of whether an interstate sale at a discriminatory price gave rise to a cause of action to a plaintiff whose "business is altogether intrastate" — an inquiry which did *not* delve into the issue of whether the interstate sale was to a competitor of plaintiff.

The final reference to Rowe in *Mayer Paving* is: "'For to the extent customers on different sides of a boundary line do not compete with each other, no adverse competitive effects on the customer level can ensue from the supplier's price variations.' Rowe, *Price Discrimination*, *supra* at 179." *Mayer Paving*, 486 F.2d at 770.

This quotation is *not* found in Rowe's chapter on "Jurisdictional Requirements of the Robinson-Patman Act"; rather, it is located in a chapter on "Competitive Injury." The fact that Rowe discussed the issue of competing customers in this chapter, and not in the chapter on jurisdiction, demonstrates that Rowe in fact offered no support to the majority's decision in *Mayer Paving*.

Thus, contrary to Petitioner's representations, there was no "unanimity previously existing on this issue," and there was a "basis in federal case law" for the Eighth Circuit's decision. The bottom line is that there have been only two cases[3] whose results have turned on this issue in the 85-year history of the Robinson-Patman Act. This is not a "burning issue" which cries out for immediate resolution by this Court.

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[3] or three cases, if the footnote in *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 880-81 n.13 (9th Cir. 1982), *cert. denied*, 460 U.S. 1085 (1983), opinion after remand, 594 F. Supp. 1022, 1034-1035 (N.D. Cal. 1984), is counted.

As Petitioner correctly states, this is a "secondary line injury" case. (Petition 2-3.) This Court has ruled that it is *not* necessary to show competition between favored and disfavored purchasers in "primary line injury" cases: "The existence of competition among buyers who are charged different prices by a seller is *obviously important* in terms of adverse effect upon secondary-line competition, but it would be merely a fortuitous circumstance so far as injury to primary-line competition is concerned." *Anheuser-Busch, Inc.*, 363 U.S. at 546. The statute does not speak of "primary-line" or "secondary-line" injury or competition. Neither Petitioner nor the court in *Mayer Paving* has pointed to any language in the statute which justifies placing a jurisdictional hurdle of proof of competition between favored and disfavored purchasers in a secondary-line case, where no such hurdle exists in a primary-line case.

Moreover, this case does not present an appropriate factual setting for resolution of this issue. Petitioner argues that: "Where, as here, the distributors of a product have exclusive territories, they do not, by definition, compete with each other, and therefore sales to them at different prices cannot possibly be said 'substantially to lessen competition,' as required by § 2(a). *Best Brands Beverage, Inc. v. Falstaff Brewing Corp.*, 842 F.2d 578, 584-86 (2d Cir. 1987)(no reasonable juror could find competition where plaintiff had exclusive territory)."[4] (Petition 6.)

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[4] Petitioner's citation of *Best Brands* undercuts its principal thesis. Falstaff won the case on a jury verdict, not on the grounds of lack of subject-matter jurisdiction. The Second Circuit treated competition between favored and disfavored purchasers as proof relevant to the element of effect on competition, not as a jurisdictional prerequisite. *See* the Eighth Circuit's opinion herein, Petition at A-7. *Also see White Industries., Inc. v. Cessna Aircraft Co.*, 657 F. Supp. 687 (W.D. Mo. 1986), *aff'd*, 845 F.2d 1497 (8th Cir.), *cert. denied*, 488 U.S. 856 (1988); *Stelwagon Mfg. Co. v. Tarmac Roofing*, 63 F.3d 1267, 1271 (3d Cir. 1995), *cert. denied*, 516 U.S. 1172 (1996), and the Eighth Circuit's discussion of these cases reprinted on pages A-7 to A-8 of the Petition.

Best Brands Beverage, Inc. was a "master distributor" who sold to wholesalers with fixed locations in its territory, who, in turn, sold to retailers located within Best Brands' territory. Thus, Best Brands and the favored master distributor did not in fact solicit or sell to the same customers. In the instant case, Respondents and the favored branch dealers operate about 2,000 retail "points of sale" through vending machines, and seek the custom of every potential newspaper reader in the Greater St. Louis Metropolitan Area. In this regard, Respondents are no different from any other retailers who sell from fixed locations, such as service stations, groceries, liquor stores, fast-food restaurants, florists, convenience stores, etc. All that Respondents need show is that they sell newspapers in the same geographic market as the favored branch dealers. *Gold Strike Stamp Co. v. Christensen*, 436 F.2d 791, 794 (10th Cir. 1970); *McCormack v. Theo. Hamm Brewing Co.*, 284 F. Supp. 158, 162-63 (D. Minn. 1968); *Ingram v. Phillips Petroleum Co.*, 259 F. Supp. 176, 182 (D.N.M. 1966); Wright Patman, *The Robinson-Patman Act* 53 (1938); 4 Julian O. Von Kalinowski, Peter Sullivan & Maureen McGwire, *Antitrust Laws & Trade Regulation* §§ 39.02[1] at 39-14, 39-16, 39.02[2] at 39-25 to 39-26, 39.02[3] at 39-27.[5] Even the district

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[5] The illogic of Petitioner's position may be illustrated by a hypothetical. Branch boundaries coincide with streets. Suppose that the northern boundary of disfavored branch dealer A is the southern side of Main Street, and the southern boundary of favored branch dealer B is the north side of Main Street. Fifth Street runs in a north-south direction through both branches. Branch dealer A has a vending machine on the southeast corner of Fifth and Main, and branch dealer B has a vending machine on the northeast corner of the same intersection. Customer C lives on Fifth Street in branch dealer A's territory. As he heads north to work in the morning, C may stop at the first vending machine he sees to purchase a St. Louis Post-Dispatch. However, if that vending machine is empty, or malfunctions, he may then drive across Main and purchase a newspaper from branch dealer B's vending machine. According to Petitioner's thesis, since all of A's vending machines are located in A's

Footnote 5 continued on the next page.

judge in the instant case recognized that "if customers located in a plaintiff's branch service area are likely to buy the Post-Dispatch in another branch service area, the two branch dealers may be viewed as competitors." (Petition A-16.)

Finally, Petitioner engages in hyperbole which is extreme even for a lawyer: "The unprecedented holding below . . . mandates a monumental[6] waste of judicial resources over cases that should be declared jurisdictionally stillborn." (Petition 5.) The Eighth Circuit had an answer for this: "It may be that appellants will be unable to prove any competitive relationship, and consequently, no competitive harm. . . . Should the issue of a lack of competitive relationship between favored and disfavored branch dealers present itself in the future, for example as part of a motion for summary judgment, the district court would then review the evidence under a different standard." (Petition A-9.)

The only significant logistical difference between Petitioner's proposed remedy for lack of proof of competition between favored and disfavored purchasers, and that suggested by the Eighth Circuit Court of Appeals, is that, in the latter case, Respondents will be entitled to discovery on the case as a whole, whereas, to date, Respondents have been limited to discovery on

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Footnote 5 continued from the previous page.

branch, and all of B's vending machines are located in B's branch, "they do not, by definition, compete with each other." (Petition 6). This is not logical. Furthermore, since B pays less for the St. Louis Post-Dispatch than A, he can use the extra capital to buy another delivery truck, hire another driver, lease another vending machine, etc., to make sure that he has newspapers available for C to purchase when A does not.

[6] Syn: "vast, immense, prodigious, stupendous, enormous, huge, colossal . . . ; cosmic, astronomical, mammoth." Peter M. Roget, International Thesaurus § 34.11 (3d ed. 1962).

the jurisdictional issue presented herein. The only "judicial resources" involved would be resolution of discovery disputes, if any. Using this Court's critical judicial resources to save the judicial resources involved in resolution by a district court of discovery issues would be wasteful indeed.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.